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March 20, 2002

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MAR 20 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: MM Docket No. 00-245 /
RM-9971, RM-10185, RM-10186
Alberta and Dinwiddie, Virginia, and
Whitakers and Garysburg, North Carolina

Dear Mr. Caton:

Transmitted herewith, on behalf of Garysburg Radio, are an original and four copies of its "Motion to Accept Response and Response to Comments with Respect to Reply to Response to Order to Show Cause" in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,



Anne Goodwin Crump
Counsel for Garysburg Radio

Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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MAR 20 2002

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM DOCKET NO. 00-245
Table of Allotments, FM Broadcast Stations.)	RM-9971
(Alberta and Dinwiddie, Virginia, and)	RM-10185
Whitakers and Garysburg, North Carolina)	RM-10186

Directed to: Chief, Allocations Branch

**MOTION TO ACCEPT RESPONSE AND
RESPONSE TO COMMENTS WITH RESPECT TO
REPLY TO RESPONSE TO ORDER TO SHOW CAUSE**

Garysburg Radio, by its attorneys, hereby respectfully requests leave to submit the following Response to the "Comments with Respect to 'Reply to Response to Order to Show Cause,'" submitted by MainQuad Broadcasting, Inc. ("MainQuad") on March 8, 2002 (the "Comments"), in the above-captioned proceeding. As set forth below, this Response is essential to correct errors of law and misstatements of fact contained in the Comments. With respect thereto, the following is submitted:

1. MainQuad's Comments were submitted in response to Garysburg Radio's Reply to MainQuad's Response to the Order to Show Cause, DA 01-2986, released December 21, 2001, in this proceeding (the "Show Cause Order"). The Show Cause Order instructs MainQuad to demonstrate why the license for WSMY-FM, Alberta, Virginia, should not be modified to specify operation on Channel 299A in lieu of Channel 276A in order to accommodate the allotment of Channel 276A to Garysburg, North Carolina, and the retention of the sole local

broadcast service at Alberta. In its Response, contrary to MainQuad's most recent claims, Garysburg Radio reaffirmed its support for its counterproposal in this proceeding and its intent to compensate MainQuad for its reasonable expenses in connection with the proposed change in channel, but also pointed out the erroneous assertions made by MainQuad in its Response to Order to Show Cause. MainQuad, however, appears to have chosen to ignore or misconstrue the statements and showings made by Garysburg Radio in its Reply.

2. MainQuad first attempts to make much of the fact that Garysburg Radio's Reply restates its commitment to reimburse MainQuad's expenses in connection with the proposed channel change in different words from those used in Garysburg Radio's counterproposal in this proceeding. MainQuad's grandiose and dramatic claim that Garysburg Radio has somehow turned away from its commitment to reimburse MainQuad in accordance with the Commission's policies is entirely false, however. Rather, Garysburg Radio's restatement of its intent in the Reply simply mirrors the Commission's long-standing policy in this area.

3. MainQuad objects to Garysburg Radio's statement that it will reimburse MainQuad's reasonable expenses in the event that Garysburg Radio becomes the permittee of the proposed Garysburg station. MainQuad claims that Garysburg Radio should be required to pay those expenses regardless of whether it is the ultimate beneficiary of the channel change proposed in the instant rule making proceeding. MainQuad's argument flies directly in the face of Commission precedent, however, as the same theory was long ago specifically considered and rejected by the Commission. *See, Circleville, Ohio*, 8 FCC Rcd 159 (1967). In that case, an existing licensee which would be required to change channels argued that a petitioner for a new channel should be required to reimburse the licensee "whether or not that party becomes the

permittee on the new ... channel,” but the petitioner argued that “it should be responsible only if it gets the channel and that whoever becomes the permittee should be the source of reimbursement.” *Id.* at 163. The Commission agreed with the petitioner, noting that it had “repeatedly stated that the reimbursement should come from the party benefiting from the change; i.e., whoever becomes the permittee on the new channel.” *Id.*

4. This policy has been repeatedly restated. For example, in *Frost Lake, Brainerd and Morris, Minnesota*, 61 FCC Rcd 113 (1976), the Commission unequivocally stated that “[i]t is Commission policy ... to require the beneficiary of a channel change, *i.e.*, the future licensee of the new assignment to reimburse existing stations for the reasonable costs of changing to the new frequency. *Id.* at 116, citing, *Circleville, Ohio*, 8 F.C.C.2d 159. See also, *e.g.*, *Gouverneur and Ogdensburg, New York*, 45 R.R.2d 763 (B/cast Bur. 1979); *Castle Rock, Colorado*, 40 R.R.2d 170 (B/cast Bur. 1977); *Red Oak, Iowa and Maryville, Missouri*, 38 R.R.2d 111 (B/cast Bur. 1976).

5. Thus, Garysburg Radio’s statement concerning its reimbursement commitment was merely a restatement of the Commission’s long-standing policy in this matter. Garysburg Radio is unaware of any change to this settled policy, and MainQuad has pointed to no such rule making proceeding which Garysburg Radio might possibly have missed. Thus, it is clear that MainQuad’s extended argument is utterly without basis.

6. Moreover, MainQuad’s reimbursement argument is a rather peculiar one. MainQuad argues that the channel change could be economically justified if it is a part of the relocation of the channel to Whitakers, but that it could not be supported if it merely would allow WSMY-FM to go back into operation at Alberta. MainQuad claims that it would be required to expend funds

for which there would be “no offsetting economic benefit” and that such an expenditure would affect the station’s “bottom line.” Comments at 3-4 (emphasis added). It must be remembered, however, that WSMY-FM is currently off the air, and MainQuad has asserted that it has taken the station silent due to interference problems with its current frequency. Thus, the station currently has no income whatsoever, and the broadcast facilities which MainQuad spent considerable sums to build are sitting idle.

7. One would think that, under these circumstances, MainQuad would be happy to make the relatively minor expenditures to change channels, with the promise of future reimbursement, in order to be able to go back on the air and begin generating advertising income. Obviously, such income would necessarily improve the station’s “bottom line” over the current situation, and the service to Alberta could hardly be degraded beyond its current total lack of such service. The income from the station’s resumed operation thus would seem to provide at least some economic benefit to MainQuad, contrary to its sweeping assertion. It should also be noted that MainQuad has previously indicated that it is seeking a new transmitter site for WSMY-FM. Clearly, the construction of new facilities at a new site would involve significantly more expense than a mere change in channel. It thus would seem that MainQuad should welcome the lesser expenditure. MainQuad’s dismissive statements, however, have once again demonstrated that MainQuad actually places no value whatsoever on serving the community of Alberta, but rather it is entirely consumed with the desire to move to the Rocky Mount suburb of Whitakers.

8. MainQuad also argues in its Comments that Garysburg Radio has somehow abandoned its Garysburg proposal merely because it pointed out the obvious fact that, if the WSMY-FM license is modified to specify operation on Channel 299A, then Channel 276 would

be available for allotment at either Garysburg or Whitakers. MainQuad's allegation is entirely inaccurate. Apparently, MainQuad chose to ignore Garysburg Radio's quite clear statement in its Reply that "Garysburg Radio continues to believe that Garysburg is the more deserving community, as previously demonstrated by Garysburg Radio's comments and reply comments in this proceeding." Reply at 2. Garysburg Radio discussed the fact that a new channel could be allotted to either Garysburg or Whitakers solely to point out the erroneous nature of MainQuad's claim in its Response to Order to Show Cause that a change in the channel for WSMY-FM would somehow preclude the public interest benefits which it asserts would be realized by an allotment at Whitakers.

9. While Garysburg Radio now once again affirms that it believes greater public interest benefits would be achieved through the proposed Garysburg allotment, it remains an unavoidable fact that the modification of the WSMY-FM allotment would allow for the allotment of Channel 276 at either Whitakers or Garysburg as a new allotment of a first local broadcast service. Apparently, however, MainQuad believes that the public interest benefits associated with the Whitakers allotment could be realized only if it is the licensee of the proposed Whitakers station. Obviously, this reasoning does not follow and only serves to demonstrate that MainQuad's goal is primarily to serve its own financial interest, with any peripheral public interest benefits taking a poor second place. Thus, MainQuad's claims concerning Garysburg Radio are entirely misplaced, as the purpose of Garysburg Radio's submissions in its Reply was merely to point out that, contrary to MainQuad's assertions, it would be possible to realize all of the public interest benefits claimed by MainQuad for the Whitakers allotment regardless of whether the WSMY-

FM channel is reallocated or not.¹ Consideration of the relative merits of a Garysburg or Whitakers allotment is utterly irrelevant to the fact that Channel 276 theoretically *could* be allotted to Whitakers as a new allotment, thereby providing for the residents of Whitakers without any disruption in service to Alberta. The question of whether the allotment *should* be allotted to Whitakers as opposed to Garysburg is an entirely separate issue, and a matter on which Garysburg Radio has repeatedly set forth its view as to the superiority of a Garysburg allotment.

10. MainQuad has further made expansive claims about the greater number of total persons who would gain service as a result of the adoption of its proposal. Nonetheless, as the Commission has only recently clarified, this information is irrelevant to the decision to be made in this proceeding. *See Cumberland, Kentucky and Weber City, Virginia; Glade Spring, Marion, Richlands and Grundy, Virginia*, DA 02-620, released March 19, 2002. MainQuad has not claimed that any of the persons within the proposed service area of a reallocated station at Whitakers are currently underserved. Further, it must be remembered that both MainQuad's initial proposal and Garysburg Radio's counterproposal were submitted to seek allotment of a first local service at their respective proposed communities of license. In such circumstances, "the Commission has used the populations of the communities of license as the tie-breaking mechanism," and also has "taken into account the number of reception services available to the


¹ Indeed, since MainQuad has committed itself to remaining in Alberta pending the commencement of operations by a new station there, the proposed reallocation to Whitakers would not even have any advantage of expediting service to Whitakers. No matter which community receives a new allotment, it would be necessary to await the opening of an application filing window, the completion of a possible auction, and the construction of new facilities before the residents of Whitakers could receive service. In addition, in the case of a reallocation, it would be necessary to await the construction of two new facilities, one at Alberta and one at Whitakers, before the new service could begin.

populations of the competing communities.” *Id.* at ¶ 9. Nonetheless, “[w]here the number of reception services was above a threshold level, the Commission has based the decision on a straight population comparison.” *Id.*, citing *Blanchard, Louisiana and Stephens, Arkansas*, 10 FCC Rcd 9828, 9829 (1995) and cases cited therein; *Rose Hill, Trenton, Aurora and Ocracoke, North Carolina*, 11 FCC Rcd 21223 (1996); *Athens and Atlanta, Illinois*, 11 FCC Rcd 3445 (1996). In the *Cumberland* case, the Commission’s staff specifically rejected consideration of a net gain of service which would be realized through a reallocation as changing the outcome of this calculation. *Cumberland, Kentucky, et al.*, DA 02-620 at ¶ 10. In the instant case, the 2000 U.S. Census shows that the community of Garysburg has a total population of 1,254 persons, some 96 percent of which are listed as Black or African-American. See <http://factfinder.census.gov>. In contrast, the community of Whitakers has a 2000 Census population of 799 persons. *Id.* Clearly, the population difference between the two communities of 455 persons is substantially more than the 38 person difference found to be dispositive in the *Blanchard* case and the 41 person difference found to be dispositive in the *Cumberland* case. The attempt by MainQuad to rely on its net gain figures for its proposal to alter the result of this calculation is utterly without basis in law, as has been most recently explained in *Cumberland, Kentucky, et al.* Accordingly, its arguments in that regard must be rejected as irrelevant.

11. In summation, submission of the instant Response is necessary for Garysburg Radio to correct two errors of law and one error of fact contained in MainQuad's Comments. Garysburg Radio therefore requests that the Commission accept and consider the response contained herein so that it may have a complete and accurate record before it in this proceeding.

Respectfully submitted,

GARYSBURG RADIO

By: 
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March 20, 2002

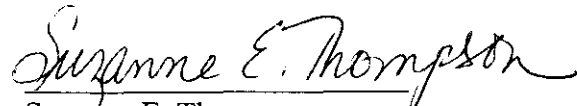
CERTIFICATE OF SERVICE

I, Suzanne E. Thompson, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C. do hereby certify that true copies of the foregoing "Motion to Accept Response and Response to Comments with Respect to Reply to Response to Order to Show Cause" were sent this 20th day of March, 2002, by United States mail, postage prepaid, to the following:

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